

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

DELBERT M. GREENE,

Plaintiff,

v.

STATE OF NEVADA, *et. al.*,

Defendants.

Case No. 3:22-CV-00105-RCJ-CLB

**REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Delbert M. Greene's ("Greene"), application to proceed *in forma pauperis* (ECF No. 1), and complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Greene's *in forma pauperis* application, (ECF No. 1), be denied, and his complaint (ECF No. 1-1), be dismissed without prejudice and without leave to amend.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

¹ This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 “[T]he supporting affidavit [must] state the facts as to [the] affiant’s poverty with
 2 some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
 3 Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely
 4 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
 5 335 U.S. 331, 339 (1948).

6 A review of the application to proceed IFP reveals Greene can pay the filing fee.
 7 However, because the Court recommends that this case be dismissed without prejudice
 8 and without leave to amend, the Court also recommends that Greene not be assessed
 9 the filing fee and the motion be denied as moot.

10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
 12 provides, in relevant part, that “the court shall dismiss the case at any time if the court
 13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
 14 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
 15 who is immune from such relief.” 28 U.S.C. § 1915A(b). A complaint is frivolous when
 16 “it lacks an arguable basis in either law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325
 17 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
 18 against defendants who are immune from suit or claims of infringement of a legal interest
 19 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 20 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
 21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
 22 standard applied in the context of a motion to dismiss under Federal Rule of Civil
 23 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
 24 requires dismissal where the complaint fails to “state a claim for relief that is plausible on
 25 its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
 27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
 28 accept as true all well-pled factual allegations, set aside legal conclusions, and verify

1 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
 2 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
 3 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
 4 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is
 5 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
 6 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
 7 Still, a liberal construction may not be used to supply an essential element of the claim
 8 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
 9 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
 10 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
 11 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

12 **III. SCREENING OF COMPLAINT**

13 In his complaint, Greene sues Defendants State of Nevada, Eighth Judicial District
 14 Court, District Attorney Office, Clerk Steven D. Grirson, Detective Jason Nelson, Court
 15 Reporter Kimberly Farkas, and Attorneys John P. Parris, Adam L. Gill, and Caesar
 16 Almase (collectively referred to as “Defendants”) under 42 U.S.C. § 1983. (See ECF No.
 17 1-1.) Greene’s complaint alleges that the Defendants “conspired to defraud Plaintiff of
 18 his immunities while falsely prosecuting him by violation of ‘procedural’ rights of a United
 19 States Citizen.” (*Id.* at 4.) Greene asserts five counts, which all relate to his underlying
 20 criminal case and conviction. (*Id.* at 5-28.) Greene requests monetary damages and “the
 21 release of [his] conviction.” (*Id.* at 31.)

22 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
 23 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
 24 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.
 25 2000)). The statute “provides a federal cause of action against any person who, acting
 26 under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526
 27 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive
 28 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,

1 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation
2 of a federally-protected right by (2) a person or official who acts under the color of state
3 law. *Anderson*, 451 F.3d at 1067.

4 However, § 1983 is not a backdoor through which a federal court may overturn a
5 state court conviction or award relief related to the fact or duration of a sentence. Section
6 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
7 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they
8 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.
9 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take
10 care to prevent prisoners from relying on § 1983 to subvert the differing procedural
11 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at
12 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner
13 challenges the legality or duration of his custody, raises a constitutional challenge which
14 could entitle him to an earlier release, or seeks damages for purported deficiencies in his
15 state court criminal case, which effected a conviction or lengthier sentence, his sole
16 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);
17 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*
18 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where
19 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
20 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate
21 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

22 It appears that Greene is challenging the constitutionality of his state court criminal
23 conviction. Consequently, he must demonstrate that his conviction has been overturned
24 to proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas*
25 *corpus* action. The Court, therefore, recommends that the complaint be dismissed without
26 prejudice and without leave to amend.

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1 **IV. CONCLUSION**

2 For good cause appearing and for the reasons stated above, the Court
3 recommends that Greene's application to proceed *in forma pauperis*, (ECF No. 1), be
4 denied as moot, and his complaint, (ECF No. 1-1), be dismissed without prejudice and
5 without leave to amend.

6 The parties are advised:

7 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
8 Practice, the parties may file specific written objections to this Report and
9 Recommendation within fourteen days of receipt. These objections should be entitled
10 "Objections to Magistrate Judge's Report and Recommendation" and should be
11 accompanied by points and authorities for consideration by the District Court.

12 2. This Report and Recommendation is not an appealable order and any
13 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
14 District Court's judgment.

15 **V. RECOMMENDATION**

16 **IT IS THEREFORE RECOMMENDED** that Greene's application to proceed *in*
17 *forma pauperis*, (ECF No. 1), be **DENIED AS MOOT**;

18 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-
19 1); and,

20 **IT IS FURTHER RECOMMENDED** that Greene's complaint, (ECF No. 1-1), be
21 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

22 **DATED:** March 7, 2022.

23 
24 **UNITED STATES MAGISTRATE JUDGE**